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No. 82-470

IN THE

Supreme Court of the United States

October Term, 1982

THE CITY OF LOS ANGELES,

Petitioner,

vs.

SOCIETA PER AZIONI DE NAVIGAZIONE ITALIA, a corporation,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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I.

The California Supreme Court Did Not Apply State Law so as to Destroy Uniformity of General Maritime Law.

The City's first argument in support of its petition is that the California Supreme Court ". . . exceeded the jurisdiction allowed it by the savings to suitors clause by determining liability for vessel accidents under state law." [p. 8, Petition]

Even a slight perusal of the California Supreme Court's opinion reveals the inaccuracy of the City's assertion. In Part II of the opinion, the Court discussed the respective liabilities of the shipowner and the City for pilot negligence and held, specifically, that the substantive law to be applied

is the general maritime law and not state law. As the Court declared in footnote 10:

> "As a general rule, the substantive law to be applied in maritime actions is the general federal maritime law. [*Southern Pacific Co. v. Jensen*, (1917) 244 U.S. 205, 215; *Intagliata v. Shipowners & Mer., Etc., Co.*, (1945) 26 Cal.2d 365, 369-370]. State law is to be applied only where it does not conflict with an established federal maritime rule or does not otherwise interfere with a needed uniformity in the characteristic feature of the federal maritime law (E.g., *Askew v. American Waterways Operators, Inc.* (1973) 411 U.S. 325, 338-340.)
>
> The rule is no different where the action involves the legal consequences of negligent pilotage. While Congress has seen fit to delegate to the states the power to regulate pilotage (see 46 U.S.C. §211), this regulatory authority has traditionally been viewed as encompassing only matters such as licensing, fees and the like. (See generally Annot., State Regulation of Maritime Pilots Under 46 U.S.C. §211 (1977) 35 A.L.R. Fed. 525.)"

The Court then discussed the liability issue in great depth, relying upon numerous decisions of this Court and of federal courts of appeal in support of its conclusion that the pilot was a joint servant of the shipowner and the City. The California Supreme Court decision on this point, based as it was upon the general maritime law, does not in any respect destroy uniformity of the maritime law but actually reinforces it.

In Part III of its opinion, the California Supreme Court considered the further issue of whether the result dictated by the general maritime law, described above, would be altered by reason of the municipal ordinance by which the City purported to exculpate itself from liability for the neg-

ligence of its pilot-employee. As the Court noted, the City of Los Angeles is a chartered city established by the California Legislature and has only those powers given to it by the Legislature, which powers are specifically limited to making and enforcing ordinances and regulations in respect to "municipal" affairs. The City conceded, as it was required to do, that the liability of a municipality, such as itself, is not a "municipal" affair but instead is a matter of "general state concern" over which the State Legislature alone has jurisdiction. Since the State Legislature has enacted the California Tort Claims Act which provides that a public entity is liable for the negligence of its employees to the same extent as a private employer, the liability of the City was fixed by that statute and the City's ordinance, which was patently inconsistent therewith, was void.

In determining the City's authority to adopt this ordinance, the California Supreme Court properly looked to the state law which created the City and from which the City draws whatever powers it possesses. It is well-settled that a federal court, when examining the powers of a municipality to adopt an ordinance, must do exactly the same thing, *i.e.*, look to the state law which created the municipality. See *City of Safe Harbor v. Ritchfield*, (5th Cir. 1976) 529 F.2d 1251, 1254.

In Part IV of its opinion, the California Supreme Court reviewed the evidence relating to the City's claim that it had an oral contract with the shipowner which incorporated the exculpatory language of the void ordinance. In finding there was no evidence of record to support such a contract, the Court reviewed numerous federal and state decisions and found that under no legal theory, or governing body of law, was there any evidence to support the City's contract contention.

In summary, the California Supreme Court relied upon federal maritime law to determine the liability of the shipowner and the City for pilot negligence and to determine the terms of the pilotage contract. The Court looked to California law only to determine the authority of the City to adopt the exculpatory ordinance and this is exactly what federal courts do in the same circumstances. Accordingly, the City's assertion that the California Supreme Court applied the wrong law, and thereby destroyed uniformity of maritime law, is patently and totally without merit.

II.

This Decision Is Not in Conflict With *United States v. S.S. President Van Buren*, (9th Cir. 1973) 490 F.2d 504.

In support of its petition the City next argued this decision is in conflict with *United States v. S.S. President Van Buren*, (9th Cir. 1973) 490 F.2d 504, known as *Van Buren II*. The City misreads both opinions.

In *Van Buren II*, the Ninth Circuit rules without much discussion on this point that a Long Beach tariff which contained an option trip insurance provision, which the Los Angeles tariff lacks, was enforceable. The Ninth Circuit did not even discuss or rule upon the threshold question of whether the municipality had the authority in the first instance to adopt such an ordinance. The two opinions are not in conflict — the California Supreme Court simply decided its case on grounds which were not discussed or ruled upon by the Ninth Circuit.

III.

This Decision Is Not Inconsistent With Any Maritime Rule Applicable to Borrowed Servants.

The City's last argument in support of its petition is that the California Supreme Court in deciding that the pilot was a joint servant of the shipowner and the City relied upon

a "status" test rather than upon an "ability to control" test. The City's statement is flagrantly erroneous, since the California Supreme Court specifically declared, in reliance upon a ruling of this Court, that control is probably the singlemost important factor in determining whether an employment relationship exists. (31 Cal.3d 459). The California Supreme Court then reviewed in great depth the evidence pertaining to ability to control and decided the issue on that basis. The City's present reference to a status test is not only patently erroneous but is incomprehensible.

In support of this argument, the City cites the opinion of the California Court of Appeals, but the City well-knows, or should know, that any reference at this time to such a citation is completely improper. In California, the granting of a hearing by the California Supreme Court had the effect of vacating the Court of Appeals' decision. Although that decision was printed in the Advance Sheets before it was vacated, the opinion will not appear in the permanent case reports and is considered a complete nullity which cannot be cited or relied upon for any purpose. See *Knouse v. Nimocks*, (1937) 8 Cal.2d 482, 483-4, 66 P.2d 438.

Conclusion.

It is clear that the City had failed to establish any basis for the issuance of a writ of certiorari within the scope of Supreme Court Rule 17. The City has not demonstrated that the California Supreme Court decided a question of federal law which is in any way in conflict with the decision of another state court of last resort nor of a federal court of

appeals. This appears to have been the only ground relied upon by the City and there is nothing to support it.

Respectfully submitted,

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